

SERVICE DATE – AUGUST 19, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 30186

TONGUE RIVER RAILROAD COMPANY, INC.—RAIL CONSTRUCTION AND
OPERATION—IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MONT.

Digest:¹ This decision denies an appeal of decisions by the Director of the Board's Office of Proceedings that modified the procedural schedule.

Decided: August 17, 2015

Jay L. Schollmeyer, on behalf of SMART-Transportation Division, General Committee of Adjustment (GO-386) (hereinafter, SMART-386)² appeals decisions by the Director of the Office of Proceedings modifying the procedural schedule.³ As discussed below, SMART-386's appeal will be denied.

BACKGROUND

In a decision served on September 10, 2014, the Board granted in part a motion to compel discovery filed by the Northern Plains Resource Council (NPRC) seeking production of documents and responses to interrogatories by Tongue River Railroad Company, Inc. (TRRC) and two of TRRC's owners, BNSF Railway Company (BNSF) and Arch Coal, Inc.⁴ That

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

² Schollmeyer is the General Chairman for SMART-Transportation Division, the successor to the United Transportation Union.

³ SMART-386 styles its filing as a "Petition for Reconsideration of Procedural Decisions," but a petition for reconsideration is a discretionary appeal of an entire Board action, rather than an order by the Director. 49 C.F.R. § 1115.3. Therefore, the Board will treat SMART-386 as an appeal of the Director's decisions.

⁴ TRRC has filed a supplemental application seeking authority under 49 U.S.C. § 10901 for it to construct and for BNSF to operate a rail line in southeast Montana. The primary purpose of the proposed line is to transport low sulfur sub-bituminous coal from a planned coal mine at Otter Creek, Mont., currently in the state permitting process, and other possible future mines that might be developed in the Otter Creek and Ashland, Mont., area. The Board's predecessor agency authorized a similar line construction proposal in 1986. See Tongue River R.R.—Rail

(continued . . .)

decision also established a procedural schedule for subsequent filings, and, on September 17, 2014, SMART-386 filed a petition seeking modification of the procedural schedule.

The Director of the Office of Proceedings granted in part SMART-386's request for a schedule modification in a decision served on November 21, 2014. That decision permitted SMART-386 to file a reply 14 days after NPRC files its supplemental submission, to the extent that NPRC's supplemental submission relates to matters discussed in the April 2, 2013 comments filed by SMART-386's predecessor, the United Transportation Union, General Committee of Adjustment (UTU/GO-386). Subsequently, TRRC submitted a proposed procedural schedule that incorporated the extension of TRRC's rebuttal deadline by 14 days and the opportunity for SMART-386 to submit its limited reply to NPRC's supplemental submission. On December 9, 2014, the Director granted the proposed procedural schedule submitted by TRRC.

On December 11, 2014, SMART-386 submitted the current filing, which appeals, in part, the November 21, 2014 decision and the December 9, 2014 decision. SMART-386 argues that the November 21 decision unfairly restricts the potential content of its reply only to NPRC's supplemental comments related to UTU/GO-386's April 2, 2013 comments. SMART-386 contends that its reply to NPRC's supplemental submission should not be restricted because (1) it was not involved in discovery; (2) recent developments strongly suggest that many parties may wish to update their earlier statements in light of the supplemental information submitted by NPRC; and (3) the November 21 and December 9 decisions will deprive SMART-386 of a full and fair hearing on the merits of TRRC's revised application for construction authority.

On January 7, 2015, TRRC responded in opposition to SMART-386's filing. TRRC argues that the petition is late because it was not filed within 10 days of the November 21 decision issued by the Director. TRRC also contends that SMART-386 failed to assert any sound reason why it should be allowed to make further representations on the merits of this proceeding or raise issues other than those UTU/GO-386 already raised in its April 2013 comments. Finally, TRRC argues that SMART-386 is not being deprived of a full and fair hearing because it had the opportunity to submit comments on the merits of TRRC's application in 2013, can comment on NPRC's supplemental submission, and will have the opportunity to comment on the Board's Draft Environmental Impact Statement (EIS).⁵

(. . . continued)

Constr. & Operation—in Custer, Powder River & Rosebud Cntys., Mont. (Tongue River I), FD 30186 (ICC served Sept. 4, 1985), modified (ICC served May 9, 1986), pet. for judicial review dismissed, N. Plains Res. Council v. ICC, 817 F.2d 758 (9th Cir. 1987). This earlier proposed line, however, was never built. The September 10, 2014 decision provides a more detailed background of this proceeding.

⁵ NPRC filed its supplemental submission on March 26, 2015, and SMART-386 filed its reply on April 9, 2015. In its reply (at 3), SMART-386 states that it “reserves the right to file additional comments in the event the opportunity arises to do so in connection with its pending December 11, 2014 petition. . . .” Thus, SMART-386's December 11, 2014 petition is not moot and is ripe for resolution.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1011.6(c)(3), the Board has delegated to the Director of the Office of Proceedings the authority to dispose of routine procedural matters. Pursuant to 49 C.F.R. § 1011.6(b), appeals of decisions issued by the Director under the authority delegated by 49 C.F.R. § 1011.6 are decided by the Board. When the Director exercises authority delegated under § 1011.6, appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice. 49 C.F.R. § 1011.6(b).

We find no error in the Director's decision to limit the scope of SMART-386's reply. Without reaching the timeliness issue, we conclude that SMART-386 has not articulated a necessary basis to broaden the scope of its reply opportunity beyond the reasonable limitation set by the Director. SMART-386 has already had a full and fair opportunity to comment on the merits of TRRC's application, through the UTU/GO-386 comments submitted in April 2013. In its appeal, SMART-386 provides no explanation or reasoning as to why its lack of involvement in discovery should alter the scope of its additional participation in this proceeding. Thus, SMART-386 has failed to demonstrate that it should be allowed to submit revised or new comments on TRRC's application except where NPRC's supplemental submission relates to SMART-386's previously filed comments. Moreover, although SMART-386 also asks that the Board allow others to further comment on the transportation record, none of the other previous commenters have indicated an interest in submitting additional information. Therefore, SMART-386 has not demonstrated that the relief it seeks is necessary.

Additionally, we note that in a decision also being served today in this proceeding, TRRC is being required to supplement its document production. Pursuant to the schedule set forth in that decision, NPRC may file a further supplemental submission based on the supplemented discovery. SMART-386 may submit a reply to the extent the NPRC reply relates to SMART-386's April 2015 comments or UTU/GO-386's April 2013 comments, and TRRC may file a rebuttal to NPRC and SMART-386.

It is ordered:

1. SMART-386's appeal is denied.
2. The decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.